65. In this *Report and Order,* we again decline to require cost-based accounting rates as a precondition to foreign carrier entry into the U.S. market. We will consider, however, the relationship of accounting rates to relevant cost benchmarks as a factor under our general public interest analysis. We believe this approach will create an incentive for foreign carriers to reduce their accounting rates towards cost which, in turn, will lower prices and increase the range of services available to U.S. consumers.

66. We agree with AT&T and other commenters that accounting rates are currently far above costs and thus harmful to U.S. consumers of international telecommunications services. We thus disagree with commenters who suggest that our concern about accounting rates is "myopic" or unrelated to this proceeding. A foreign carrier's ability to evade competitive safeguards in the settlement process increases if it is affiliated with a U.S. carrier, and the incentive to evade such safeguards increases as accounting rates exceed costs. Thus, the level of accounting rates is relevant to the risks associated with foreign carrier entry.

67. We agree, however, with those commenters arguing that requiring cost-based accounting rates as a precondition of entry could preclude otherwise qualified candidates from competing in the U.S. international services market. It would become, in effect, a barrier to market entry. Such a result would be contrary to our objective of encouraging competitive entry and, thereby, reducing industry concentration on both ends of U.S. international routes. Additional competition should produce service alternatives and price competition in the U.S. market which should in turn stimulate U.S. outbound demand. This, in turn, will make foreign carriers more amenable to further reducing their accounting rates, in that they will experience less of a loss in settlement revenues. This reduces the per minute settlements burden on U.S. consumers.[69]

68. Further, we are not persuaded by AT&T's argument that, absent a requirement of cost-based accounting rates, a U.S. carrier will be able to price its U.S. services without regard to the full cost of settlements with its foreign affiliate and, thereby, will be able to "price squeeze" unaffiliated U.S. carriers.[70] In fact, AT&T's concern involves a "semi-squeeze"[71] rather than a "price squeeze." A "semi-squeeze" can occur if a vertically integrated firm is able to obtain the services or products it needs from affiliates at artificially high price levels that include excessive profits. The affiliate supplies the necessary products and services to both the vertically integrated firm and the unaffiliated competitors at this price which includes excessive profit. For the vertically integrated firm the sale is only an internal bookkeeping transaction; in effect, it pays the real cost for the inputs. The unaffiliated

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69 *See also* supra ¶ 60.

70 For a detailed description of price squeezes, *see* Joe S. Bain *Industrial Organization*, 2nd edition, John Wiley & Sons, Inc. New York (1968) pages 357-365 ("Bain").

71 *See* Bain.

competitor, however, pays not only for the underlying cost of the resources, but also for the vertically integrated competitor's excessive profits as well.

69. To effect such a "squeeze", however, additional conditions are required for the integrated firm to inflict economic harm on the non-integrated firm. The integrated firm must have control of the services or products that are the source of the squeeze and must be able to set the price of those inputs. If there are alternative suppliers or substitutes for the inputs, any attempt by the integrated firm to raise the price of the inputs will fail because the non-integrated firm will merely shift its purchases to the lower priced alternative. We are not convinced that dominant foreign carriers can set the "input" accounting rate level unilaterally. These rates are established by negotiation between a U.S. and foreign carrier. Competitive pressures from end users and carriers, as well as our International Settlements Policy, have strengthened the position of U.S. carriers during accounting rate negotiations, and we expect this trend will continue.

70. Even assuming *arguendo* that a dominant foreign carrier can unilaterally set an accounting rate, a squeeze will not succeed if the high price of a particular input can be offset by lower prices for other inputs, or economies of scale and scope, or other efficiencies. Where such offsets are possible, the integrated firm will have little or no ability to inflict substantial harm on competitors via a squeeze. AT&T has not shown that such offsets are not available to U.S. carriers. Finally, the affiliated U.S. carrier must maintain low prices and high accounting rates over a sufficiently long time period so as to inflict substantial economic harm to competitors. When all these conditions are taken into consideration, we do not believe AT&T has presented a persuasive argument that above-cost accounting rates on particular routes where a carrier has an affiliate on the foreign end realistically jeopardize the ability of unaffiliated carriers to compete on those routes or in the U.S. international services market as a whole. Additionally, we believe the possibility of such harm is outweighed by the benefits of additional price and service competition that will result from further U.S. market entry.

71. We also disagree with AT&T's argument that competition may not ensure significant progress towards cost-based accounting rates. We believe that additional service providers will increase supply options, and lower foreign calling prices. These actions should stimulate demand, and increased usage of fixed plant should reduce the carriers' average unit costs. In addition, greater demand may increase net revenues thereby reducing foreign carriers' need to rely on settlement payments to finance investment and enabling reductions in the level of accounting rates. Thus, increased global competition will encourage foreign carriers to move accounting rates towards cost-based levels. We therefore believe it would be counterproductive to require cost-based accounting rates as a precondition to foreign carrier market entry.

72. Nevertheless, the above-cost component of accounting rates does burden U.S. consumers and the U.S. economy. We have no evidence to suggest that effective competition will develop so quickly and uniformly in U.S. international telecommunications services that

an additional means for fostering cost-based accounting rates is unnecessary. Thus, we do not agree that the issue of accounting rates is irrelevant or tangential to the *Notice*, as argued by the British Government.[72] We therefore will consider the presence of cost-based accounting rates as part of our overall public interest analysis to determine whether to permit entry by a dominant foreign carrier on its affiliated route. We will also consider as a favorable factor the disclosure by a foreign carrier or its government of the accounting rates the carrier maintains with carriers in other foreign countries.[73] We believe this approach will encourage carriers in foreign countries to reduce accounting rates to cost, yet will not impede competition in the U.S. international services market by creating a significant barrier to entry.

D. Scope of Section 214 Public Interest Analysis for Applicants Affiliated with Foreign Carriers

1. Affiliation

73. This *Report and Order* adopts a minimum benchmark level of over 25 percent ownership of capital stock, or a controlling interest at any level, for classifying a U.S. carrier as an "affiliate" of a foreign carrier for the purpose of applying the effective competitive opportunities test. Our assessment of "capital stock" ownership will be made under the standards developed in Commission case law for determining such ownership.[74] We adopt this "over 25 percent" standard because of the potential for a foreign carrier with a less-than-controlling interest in a U.S. carrier to leverage its monopoly control over bottleneck facilities in the foreign market to favor its U.S. affiliate or to otherwise obtain an unfair competitive advantage in the U.S. international services market.[75] Although the test generally will apply only to U.S. carriers with greater than 25 percent foreign ownership, we reserve the right to scrutinize transactions below that very level that nonetheless present a significant potential impact on competition. We decline to consider a carrier engaged in a co-marketing agreement or other non-equity business relationship to be "affiliated" for the purpose of our effective competitive opportunities analysis, but instead address anticompetitive concerns

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72 We also do not believe that it would be necessary to determine precisely that an accounting rate is "cost-based" in order to consider it as a public interest factor, as the British government has suggested. We would consider an accounting rate level favorably if it is among the lower accounting rates which U.S. carriers have with foreign carriers and is close to the current estimated cost to terminate an international call. *See, e.g.*, AT&T Comments at 34-35.

73 *See infra*, ¶ 267, 271.

74 *See, e.g.*, *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995) (Ownership interest in a corporation for the purpose of applying the statutory benchmarks is determined by a partial owner's total capital equity contribution); *see also Wilner & Schreiner*, 103 FCC 2d 511 (Ownership interest in limited partnerships -- as opposed to voting interests -- are considered independently for Section 310 purposes).

75 Affiliation issues relating to our post-entry regulatory scheme are addressed *infra* ¶¶ 248-251.

raised by such relationships by regulatory restrictions and safeguards.[76] Finally, we adopt a prior notification and approval process for certain foreign carrier investments.

a. Affiliation Standard for Entry Purposes

74. We proposed in the *Notice* to adopt a new affiliation standard for application of our proposed rules. We tentatively concluded that we should adopt an affiliation standard at a specified ownership level which is less than that required to achieve control. We requested comment on what that level should be.[77]

Positions of the Parties

75. Several carriers argue that only foreign carriers that hold controlling interests should be considered "affiliated." Deutsche Telekom, France Telecom, and fONOROLA argue that including non-controlling interests is unnecessary because such interests do not give rise to anticompetitive incentives. Deutsche Telekom thus argues that our proposed threshold would be inconsistent with our findings in *International Services* and the goals of this proceeding.[78] Cable & Wireless and Sprint assert that an affiliation threshold that considers less-than-controlling interests would serve no purpose because acquisition of a non-controlling interest by a foreign carrier would provide no incentive for foreign governments to liberalize.[79] AmericaTel therefore argues that such a standard would inhibit investment and amount to "overkill."[80]

76. Conversely, several commenters advocate a threshold at a less-than-controlling level. The Department of Justice (Justice) states that a substantial non-controlling equity investment by a foreign carrier in a U.S. international service provider can adversely affect competition. Justice notes three forms such anticompetitive conduct might take. First, the foreign carrier may favor its U.S. affiliate contrary to the Commission's policies. Second, the investment may create incentives for the foreign carrier to engage in behavior that would increase the profits of its U.S. affiliate at the expense of U.S. consumers. Third, the foreign carrier may influence the U.S. affiliate to cooperate in conduct benefiting the foreign parent at the expense of competing U.S. carriers.[81] LDDS and AmericaTel oppose the proposed non-

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76 *See infra*, ¶ 252.

77 *Notice at* ¶¶ 52-64.

78 Deutsche Telekom Comments at 54 (citing *International Common Carrier Services*, 7 FCC Rcd 7331 (1992)).

79 Cable & Wireless Reply at 9; Sprint Comments at 26.

80 AmericaTel Comments at 13.

81 DOJ Reply at 15.

controlling interest affiliation threshold, but support a 25 percent affiliation threshold if such a test is adopted. They maintain it would be sufficient to accomplish the goals of this proceeding while providing administrative simplicity and sufficient flexibility for U.S. carriers to acquire foreign capital.[82] AT&T, BTNA, GTE and MCI argue that a ten percent interest can provide incentives to discriminate and that ample precedent exists in analogous areas for such a threshold.[83]

77. Several parties offer additional proposals. NYNEX and Teleglobe advocate a reciprocal affiliation standard, which would have our affiliation standard reflect another country's approach. TLD proposes that our market entry test should only apply to foreign carriers with significant traffic streams and investments.

Discussion

78. The record in this proceeding and our experience over the last several years lead us to conclude that a 25 percent affiliation standard, rather than a control standard, is the appropriate threshold for today's market conditions. We agree with Deutsche Telekom that adoption of a non-controlling interest standard reflects a departure from our earlier findings three years ago in *International Services*.[84] As noted above, the market for international telecommunications services is undergoing drastic and rapid change and is becoming increasingly important to the U.S. economy.[85] We now therefore find that the competitive risks are too great to exempt all non-controlling interests from our effective competitive opportunities analysis.[86]

79. We disagree with Deutsche Telekom's argument in favor of a control standard. It argues that a foreign carrier with a less-than-controlling interest does not have the power to coerce a U.S. carrier into acquiescing to its scheme of anticompetitive conduct and that such interests therefore provide no ability and very little incentive to act anticompetitively. As Justice notes, however, a substantial investment in a U.S. carrier by a foreign carrier with market power could increase the extent to which it engages in behavior harmful to U.S.

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[82] LDDS Comments at 9-10; AmericaTel Comments at 13.

[83] AT&T Comments at 25; BTNA Comments at 8-10; GTE Comments at 8; MCI Comments at 11. *See also* TLD Comments at 47-48.

[84] 7 FCC Rcd 7331 (1992) (A foreign non-controlling interest in a U.S. carrier could give a foreign carrier an incentive to favor its U.S. affiliate but would not generate sufficient concern to justify imposition of dominant carrier regulation where the interest held does not rise to the level of control.); Deutsche Telekom Comments at 51.

[85] *See supra*, ¶ 12.

[86] *See supra*, ¶ 33.

customers.[87] We find that a non-controlling interest can provide a foreign carrier with the incentive to engage in anticompetitive behavior that favors its U.S. affiliate. The foreign carrier can benefit directly by engaging in behavior that increases the profits of its U.S. affiliate when profits are passed through to the foreign carrier. A large investment in a U.S. publicly traded company, though insufficient to give the foreign carrier control, can give the foreign carrier substantial enough influence over the U.S. carrier to entice it into acquiescing to anticompetitive conduct and allocating to the foreign carrier a portion of the profits derived from such activity. We find that existing safeguards are not sufficient to control this activity because we have no jurisdiction to regulate the foreign bottleneck where such conduct would occur. We therefore find that it is necessary to scrutinize foreign carrier investments of a less-than-controlling interest.

80. We find ample precedent for our view that a less-than-controlling interest can provide a carrier with the incentive and ability to engage in anticompetitive conduct. As noted in the *Notice*, the Bell Operating Companies have been given a generic waiver from the line of business restrictions to allow them to acquire up to ten percent of foreign telephone companies subject to certain non-discrimination safeguards without specific court approval.[88] Under our ownership attribution rules in the broadcasting, cable, and Personal Communication Services (PCS) multiple ownership contexts, we have considered interests as low as five percent as providing a shareholder with the potential for influencing a licensee.[89] Deutsche Telekom objects to our reliance in the *Notice* on definitions of affiliation in other contexts because investors are considered "affiliated" at widely varying levels. It states that such definitions of "affiliation" are not relevant here because the term is defined arbitrarily according to the purpose at hand.[90] While the term "affiliation" can have different meanings in different contexts, the standards cited above and in the *Notice* are designed to identify instances where an equity investment can confer sufficient influence to raise significant

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87 DOJ Reply at 12; Department of Justice, Antitrust Division: *Proposed Final Judgement and Competitive Impact Statement, United States v. MCI Communications Corp.* and *BT Forty Eight Company*, 59 Fed. Reg. 33009, 33017. We find that a minority investment can be a way of bringing incentives of two entities into closer alignment. Although such incentives can be constructive in some contexts, such incentives can present problems where one entity possesses market power and control over bottleneck facilities. Such power, combined with restrictive regulations, makes risks too substantial.

88 *Notice* at ¶ 59; *See United States v. Western Electric Co.*, No. 82-0192 (D.D.C. Feb. 4 1993).

89 *See Report and Order*, MM Docket No. 83-46, 97 FCC 2d 997 (1984). *See also Notice of Proposed Rulemaking, Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 10 FCC Rcd 3606; 47 C.F.R. §§ 76.501, Note 2, 76.503(f), 76.504(h).; *Broadband PCS Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4959; 7 C.F.R. § 24.101; *see also Memorandum Opinion and Order* in Gen. Docket No. 90-314 and ET docket No. 92-100, 9 FCC Rcd 1309, 1312-13 (1994); *recon, granted in part, Second Memorandum Opinion and Order*, 9 FCC Rcd 4519, 4521-22 (1994) (petition for reconsideration pending).

90 Deutsche Telekom Comments at 57.

anticompetitive and other public interest concerns. These standards support our finding that a non-controlling investment confers sufficient influence on the investor to raise significant competitive concerns. We also find that the controlling interest standards cited by Deutsche Telekom are not specifically designed to identify incentives to engage in anticompetitive activity -- the purpose behind the affiliation rules we adopt here.[91]

81. Application of the effective competitive opportunities test to less-than controlling investments by a foreign carrier is not intended to restrict investment in U.S. carriers.[92] We recognize that foreign carriers can provide a significant source of needed capital for the development of the U.S. telecommunications infrastructure. Because the test will only be applied to prevent foreign-affiliated carriers from operating to closed destination markets, it is not an absolute bar to foreign carrier investment. The effective competitive opportunities test also only applies to foreign telecommunications carriers, and is not intended to restrict investment by foreign entities generally. Moreover, application of a fixed percentage standard, as opposed to a control standard, will provide foreign carrier investors with greater predictability in determining the investments to which the test will be applied and will also reduce administrative delays associated with application of the test.

82. Finally, Sprint and Cable & Wireless argue that scrutiny of less-than controlling interests does not provide foreign governments with incentives to liberalize. We do not agree. We recognize that we have no direct influence over the scope of liberalization in foreign markets. Recent experience indicates, however, that at least three dominant foreign carriers have shown a very strong desire to acquire substantial, yet non-controlling investments in U.S. carriers in order to better compete in new, potentially lucrative global markets by offering end-to-end services to large corporate customers.[93] These foreign carriers obviously consider these non-controlling investments to be very important to their strategic marketing plans, and this presumably would give them a strong incentive to encourage their governments to liberalize their markets so that they may compete effectively in global markets.

83. The next question, then, is what is the proper threshold of minority interest. We find that a greater than 25 percent affiliation standard would better advance the goals of this proceeding than would a ten percent standard. An investment greater than 25 percent is large enough to give a foreign carrier substantial influence over the conduct of a U.S. carrier and substantial rewards from anticompetitive conduct. Thus, at this level, existing safeguards may not always be sufficient.

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[91] *Id. (citing* the Equal Access to Justice Act, 47 C.F.R. § 1.1504, the Uniform System of Accounts 47 C.F.R. § 32.9000, and the MFJ, *United States v. AT&T*, 552 F. Supp 131, 160-165 (1982)).

[92] *See* AmericaTel Comments at 13; *see also* Cable & Wireless Reply at 10.

[93] *See BT/MCI*, 9 FCC Rcd, 3960; See *Sprint Communications Co, Petition for Declaratory Ruling*, File No. ISP-95-002, filed October 14, 1994.

84. Applying the test to investments above 25 percent also is consistent with the level at which foreign ownership in parents of a radio licensee is scrutinized under Section 310(b)(4) of the Act. Adoption of this affiliation standard will avoid establishing two different ownership levels for scrutiny of foreign markets as we approve foreign investments in U.S. telecommunications carriers. Finally, applying the test at this level will allow for greater clarity and predictability because many foreign carrier investments would be subject to our scrutiny under both Sections 214 and 310(b)(4).

85. We do not find that the potential anticompetitive conduct addressed by a ten percent affiliation standard would justify the detrimental impact such scrutiny would have on investment in U.S. carriers and the administrative burden associated with its application. A ten percent affiliation standard would significantly increase the number of potential investments subject to our effective competitive opportunities test. The resulting potential for administrative delays and procedural obstructionism by opponents to any foreign investment would defeat our intended purpose of facilitating foreign investments that do not erode competition. On balance, we find that applying the effective competitive opportunities test to foreign equity investments of greater than 25 percent will best balance the positive effects of market opening incentives and competitive safeguards against any negative effect due to restriction on foreign investment or administrative burden the test may cause. Adoption of the 25 percent threshold will best advance our goal of promoting competition in the U.S. market for international telecommunications services.

86. We reject the suggestions of Nynex and Teleglobe for a reciprocal affiliation standard.[94] Such an approach is not tailored to address the potential for anticompetitive use of market power, which is an important reason for government review in this context. We also reject TLD's proposal to apply any market entry standard adopted here only where the foreign carrier seeking entry: (1) terminates significant amounts of traffic in correspondence with the U.S. carrier in which it seeks to invest; (2) proposes a significant dollar investment in the U.S. carrier; or (3) proposes a significant percentage of investment.[95] We recognize that the percentage of investment by a foreign carrier, standing alone, may not identify all cases where Commission scrutiny is warranted. For this reason, we will scrutinize planned investments of 25 percent or less where they present a significant potential impact on competition in the U.S. international services market.[96] While this approach will create some regulatory uncertainty, we at this time find it preferable to selecting specific dollar and traffic thresholds necessary to implement TLD's proposed standard. The absolute size of an investment by a foreign carrier does not necessarily correlate with the influence that carrier may have with the U.S. carrier in which it invests. The significance of that investment to the U.S. carrier also depends on the nature of the capital structure of the U.S. carrier, which will vary from case to case. We also

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[94] Nynex Comments at 7-8; Teleglobe Comments at 33-34.

[95] TLD Reply at 44-48.

[96] *See infra* ¶¶ 89, 97-98.

find traffic volume to be an unreliable measure of a foreign carrier's influence with a U.S. carrier. Traffic flows on any given route vary over time. Indeed, we are concerned that the amount of traffic carried by a U.S. carrier in correspondence with its foreign carrier affiliate will increase relative to the shares of unaffiliated U.S. carriers as a result of anticompetitive conduct on the part of the affiliated U.S. and foreign carriers.

87. Finally, we also will find a foreign carrier to be affiliated with a U.S. carrier where it controls, is controlled by, or is under common control with a second foreign carrier already found to be affiliated with that U.S. carrier as outlined above.[97] We believe that anticompetitive dangers exist in such indirect investments which are equivalent to those present in a direct investment context. We therefore find that such interests require application of the effective competitive opportunities test. We find, however, that it is inappropriate to scrutinize such indirect interests using the over 25 percent standard because any influence created as a result of such an investment in this context is sufficiently attenuated, and because the U.S. carrier is under an obligation not to accept any "special concessions" from any foreign carrier, including carriers associated with its foreign affiliate.[98]

b. Scrutiny Over Foreign Investments of 25 Percent or Less

88. In the *Notice*, we proposed to preserve an avenue for Commission scrutiny of investments that do not fall within our definition of affiliation, yet that present certain unique factors demonstrating that our scrutiny is necessary to preserve the public interest.[99] LDDS objects to this proposal because it will reduce certainty in the application of the rule and increase delay.

89. We find as a general matter that foreign carrier investments of 25 percent or less will not require application of the effective competitive opportunities test. We nevertheless conclude that we should subject a foreign carrier investment to the effective competitive opportunities test where it presents a significant potential impact on competition in the U.S. market for international telecommunications services -- even if this investment does not rise to a level greater than 25 percent. Subjecting such investments to our review will create some regulatory uncertainty. But in a market such as international telecommunications where some players possess significant market power, the potential exists for substantial investments below the 25 percent level to have a dramatic impact on competition in certain limited circumstances. In addition, such scrutiny may be necessary to prevent carriers from using corporate structuring tactics to evade scrutiny under these rules.[100]

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97 *See International Services,* 7 FCC Rcd 7331, 7333, for a discussion of Commission precedent setting forth the circumstances that constitute "control" under Section 214(a).

98 *See infra,* ¶ 256-259; 47 C.F.R 63.14.

99 *Notice* at ¶ 64.

100 *See infra* ¶¶ 97-98 for a discussion of our prior notification and approval requirements.

c. Aggregation of Multiple Carrier Interests

90. The *Notice* also requested comment on the issue of how we should apply the proposed rules to an investment by more than one foreign carrier or by a consortium of foreign carriers.[101] We conclude that, where two or more foreign carriers invest in a U.S. carrier, we will consider the U.S. carrier to be foreign-affiliated where the foreign carriers are likely to act in concert and the combined foreign carrier interests either exceed 25 percent or constitute a controlling interest.[102]

91. Several U.S. carriers support the concept of aggregating the interests of foreign carrier investors in order to avoid substantial cumulative foreign investments escaping Commission review.[103] Some foreign carriers oppose aggregation because they contend that it would not advance the objectives of this proceeding and that its application to carriers with differing degrees of market openness makes it problematic.[104] Deutsche Telekom asserts that aggregation would not further the goals of this proceeding because the greater the number of participants, the less likely a scheme of anticompetitive conduct will be successful. Deutsche Telekom also argues that the smaller investments that would become subject to the proposed standard if interests were aggregated would be unlikely to persuade foreign governments to open their markets.[105] Justice, however, believes that foreign carrier interests should be aggregated where the foreign carriers that own equity in a U.S. carrier are allied in providing international telecommunications services or otherwise have sufficiently common interests to make it likely that they would act in concert to influence the U.S. carrier.[106]

92. We find Justice's view persuasive. Although it may be more difficult for multiple carriers to collude to act anticompetitively than it would for a single carrier to act alone, we find that the public interest requires that we closely scrutinize those transactions that indicate a likelihood of such collusion. For example, alliances such as Atlas, the proposed joint venture between Deutsche Telekom and France Telecom, proclaim that their benefits to customers include close coordination of services and pricing among carriers. We therefore will aggregate multiple foreign carrier interests and apply the effective competitive

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101 *Notice* at ¶ 61.

102 Similarly, where we find that two or more foreign carriers are likely to act in concert, but their combined investment in a U.S. carrier falls below the affiliation threshold, we will subject the investment to our effective competitive opportunities test where it presents a significant potential impact on competition. *See infra*, ¶¶ 93-95.

103 AT&T Comments at 27; BTNA Comments at 9; MCI Comments at 12.

104 Deutsche Telekom Comments at 61; France Telecom Comments at 10-12.

105 Deutsche Telekom Comments at 61-62.

106 DOJ Reply at 16.

opportunities test to all affiliated routes of U.S. carriers where aggregated dominant foreign carrier interests exceed 25 percent, or rise to the level of control, and those carriers are parties to a contractual relation (*e.g.* a joint venture or marketing alliance) affecting the provision or marketing of basic international telecommunications services in the United States.

d. Non-equity Business Relationships

93. In the *Notice,* we proposed not to apply the effective competitive opportunities test to U.S. carriers that are parties to *non-exclusive* co-marketing and other non-equity business alliances. We proposed instead to review the need to impose reporting requirements on carriers engaged in co-marketing arrangements for the provision of basic global network services. We expressed a heightened concern in the *Notice*, however, with *exclusive* co-marketing agreements and suggested that such arrangements should be prohibited, at least in the absence of effective facilities-based competition on the foreign end.[107]

94. Many commenters note their concern over the anticompetitive dangers of co-marketing agreements and other business alliances.[108] Some argue that anticompetitive influences are the same whether an alliance is formed by an equity investment or a non-equity agreement and that such alliances should be subject to the effective competitive opportunities test.[109] Justice agrees with our general proposition to exclude from our definition of affiliation non-equity business relationships and reserve the right to review any transaction involving foreign carrier participation.[110] Justice does note, however, that a relationship closely related to the core monopoly activities of a foreign carrier may give rise to anticompetitive problems even without an equity investment.[111] Citicorp does not support proposals that would subject co-marketing agreements and joint ventures to the proposed

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107 *Notice* at ¶¶ 62-63.

108 *See, e.g.*, MFSI Comments at 3; TLD Comments at 52; Nynex Comments at 12-13; ACC Comments at 8-12; Deutsche Telekom Reply at 31-35.

109 Deutsche Telekom Comments at 59, Reply at 31; France Telecom Comments at 12; BTNA Comments at 12-15. *See also* MFSI Comments at 3-4 (requesting that prior approval of alliances be withheld absent a finding that the allied foreign carrier freely grants operating agreements to U.S. carriers on a reasonable basis).

110 Justice Reply at 16.

111 *Id.*

entry test.[112] LDDS advocates applying dominant carrier regulation to AT&T for all routes where it is allied with a foreign carrier with market power.[113]

95. We conclude that non-equity arrangements do not constitute "affiliation" for purposes of applying our effective competitive opportunities standard. We decline to apply this analysis to any such non-equity arrangements, whether exclusive or non-exclusive, because we do not find foreign carrier participation in such alliances to constitute entry into the U.S. international services market as a common carrier.[114] Moreover, application of the effective competitive opportunities test in such an instance would not serve the goals of this proceeding and could have negative consequences. Such an application could deny U.S. consumers the competitive benefits of the services of such alliances[115] and would do little to open foreign markets. While these alliances warrant increased regulatory scrutiny,[116] we find that the incentives for collusive conduct by allied carriers are more attenuated than is the case for equity investments in a U.S. carrier by a foreign carrier. Non-equity arrangements can provide a financial incentive for carriers to act jointly in the pursuit of marketing objectives, but neither carrier derives a direct financial benefit with respect to the other's telecommunications operations. We also find that it would be extremely difficult to apply a market entry test to non-equity arrangements with a sufficient degree of certainty. In short, we conclude that the anticompetitive concerns raised by such arrangements are better addressed by our "no special concessions" requirement and our dominant carrier regulatory regime.[117]

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112 Citicorp Comments at 6-7.

113 LDDS Comments at 12. *See also* MFSI Comments at 3-4 (Commission should impose on allied U.S. carriers the nondiscrimination safeguards adopted in the *BT/MCI Order, supra* note 35, and require such U.S. carriers to ensure their foreign partners make all negotiated accounting rates simultaneously available to all U.S. carriers).

114 Indeed, if a U.S. and foreign carrier form a joint venture for the purpose of providing U.S. international basic services, that joint venture would require Section 214 authorization and be subject to our market entry rules.

115 *See* Citibank Comments at 3.

116 We concluded in *International Services* that non-equity arrangements between a U.S. and foreign carrier do not present a substantial possibility of anticompetitive effects such that these relationships need to be addressed in the context of deciding whether to regulate a carrier as dominant or non-dominant. 7 FCC Rcd at 7333. Based on the record in this proceeding, we modify this aspect of the rules adopted in *International Services*.

117 *See infra* ¶¶ 252-259.

e. Prior Notification and Approval Requirement

96. We proposed in the *Notice* that authorized carriers notify the Commission within 30 days of becoming "affiliated" with a foreign carrier. The notification would be used to determine whether a change in regulatory status is warranted and whether further review of the facts is necessary in order to determine whether the affiliation serves the public interest, convenience, and necessity. A number of parties expressed their concern that the proposed notification requirement would put the Commission in the position of deciding whether an investment complies with our proposed rules after the transaction has been already completed.[118] These carriers argue that the Commission will be reluctant to take action to reverse a transaction which has already been completed.

97. We agree with this argument. We will therefore require a U.S. international carrier to notify the Commission 60 days prior to acquisition by a foreign carrier of a ten percent or greater interest in that U.S. carrier. We will place the notification on public notice for 14 days. Unless the Commission notifies the carrier in writing within 30 days of issuance of the public notice that the investment raises a substantial and material question of fact as to whether the investment serves the public interest, convenience and necessity, then the investment is presumed to be in the public interest. If notified that the acquisition raises a substantial and material question under these market entry rules, then the carrier shall not consummate the planned investment until it has filed an application under Part 63 of the rules, and the Commission has approved the application by formal written order.[119] The Commission will act quickly to resolve all issues raised in such applications.

98. We impose this requirement for the purpose of both determining the regulatory status of the U.S. carrier, as well as determining the applicability of the effective competitive opportunities analysis. We require notification of a ten percent or greater interest to determine whether there are unique factors that require application of the test. Although standing alone we do not find a ten percent interest to be a cause for concern, where a ten percent foreign carrier investor acts in concert with foreign carrier investors of larger shares, for example, there may be cause for concern. In order to implement this reporting requirement effectively, we modify our Part 63 rules to require the reporting of both direct *and* indirect shareholdings of ten percent or more. We also modify our rules to require that all U.S. international carriers report, within 30 days of the effective date of the rules, any direct or indirect ten percent investments by foreign carriers that exist at that time.

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[118] AT&T Comments at 28; BTNA Comments at 11-12; MCI Reply at 17.

[119] Appendix B contains our market entry rules and associated rule changes.

2. Affiliated Carriers Subject to the Entry Standard

99. As proposed in the *Notice*, we will apply our effective competitive opportunities entry standard only to those entities defined as foreign *carriers* under our Rules.[120] Entities that are not foreign carriers under this definition have no control over bottleneck facilities and, as a result, cannot engage in anticompetitive conduct against unaffiliated U.S. carriers. No party objected to this approach or suggested that such entities have the ability or the incentive to engage in anticompetitive conduct in the provision of international services.

a. Dominant versus Non-dominant Carriers

100. In the *Notice,* we proposed to apply our entry standard to foreign carriers operating in "primary markets" that sought to enter the U.S. market to provide international facilities-based service.[121] Domtel emphasizes that an important source of competition for a *de facto* foreign monopoly is often a non-dominant foreign carrier.[122] Therefore, Domtel argues that a broad application of our entry standard to non-dominant foreign carriers ultimately could hinder competition in the foreign country and here. The Department of Justice is similarly sanguine about entry by foreign entities that have no economic market power in a foreign market.[123]

101. We find these arguments persuasive. A non-dominant carrier's participation in the U.S. market would likely enhance its competitive position *vis-a-vis* the dominant foreign carrier and reduce the ability of the dominant foreign carrier to exercise market power in the provision of international service between that country and the United States.[124] We also agree with Justice's view that foreign entities with no economic market power in a foreign market are not a source of regulatory concern.[125]

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120 For the purposes of the rules adopted here, a "foreign carrier" is defined as we have defined it in Section 63.01(r)(1)(ii) of our rules: ". . . [A]ny entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, *see* Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art.1." We construe this definition of a foreign carrier as we did in *International Services*. Thus, it includes foreign carriers that provide intercity or local access services or facilities in a foreign country. *International Services*, 7 FCC Rcd 7331, at 7334 n.47.

121 *See infra* ¶ 110 for an explanation of the term "primary market" as used in the *Notice*.

122 Domtel Reply at 5.

123 DOJ Reply at 24.

124 Domtel Reply at 2-9. *See also* fONOROLA Comments at 5.

125 DOJ Reply at 24.

102. Accordingly, we narrow the focus of our test to those carriers that have market power that potentially can be leveraged on international routes to the detriment of unaffiliated U.S. carriers. We will apply the effective competitive opportunities analysis only to international Section 214 applications from foreign carriers that have market power, or are affiliated with such a carrier, in the destination markets they seek to serve.[126] Foreign carriers that do not have market power, *i.e.*, control over bottleneck services or facilities, lack the ability to discriminate against unaffiliated U.S. carriers. As a result, there is no regulatory need to engage in an analysis of whether or not effective competitive opportunities exist on those routes. The fact that a non-dominant foreign carrier is applying to serve the U.S. market on an end-to-end basis suggests that, at a minimum, there are opportunities to compete in this foreign market, and we should not be imposing regulatory burdens that may hinder the development of competition in that market. Our goals of this proceeding would be furthered by enhancing this non-dominant foreign carrier's ability to compete against the dominant carrier in the provision of international services.

b. U.S. Investments in Foreign Carriers

103. We also proposed in the *Notice* to exclude from the scope of the market entry test U.S. carriers that acquire an ownership interest in foreign carriers because such scrutiny would not further the goals underlying this proceeding.[127]

104. Domtel opposes this proposal because it maintains U.S. owners of foreign carriers possess the ability and incentive to discriminate against carriers that do not possess such an interest. This is particularly true, Domtel argues, where the foreign carrier is dominant in its market and a controlling interest is acquired by a U.S. carrier.[128] TLD similarly argues that by not examining U.S. carriers' foreign investments, we have not provided in the *Notice* a rationale for alleged disparate treatment of AT&T vis-a-vis other carriers.[129] Such disparate treatment, TLD argues, might be viewed by some foreign governments as protectionist, and possibly by U.S. courts as violating the Equal Protection Clause.[130]

105. We do not find Domtel's arguments against our proposal to exclude investments by U.S. carriers in foreign carriers persuasive. While a substantial investment by

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126 *See infra* ¶ 116. Section 63.01(r)(8) of the Commission's rules, as amended in this *Report and Order*, sets forth factors that relate to the scope or degree of a foreign carrier's market power. 47 CFR § 63.01(r)(7). *See infra* Appendix B.

127 *Notice* at ¶ 50.

128 Domtel Reply at 16.

129 TLD Comments at 60.

130 *Id.*

a U.S. carrier in a dominant foreign carrier may raise competition concerns with respect to traffic between the foreign country and the United States, there are established Commission rules and policies, as well as antitrust laws, that address such concerns.[131] We have confidence in our ability to address any such competitive concerns with our traditional safeguards, including our dominant carrier safeguards.[132] In contrast, we do not have as effective means to guard against anticompetitive conduct made possible by a foreign carrier's control over the foreign bottleneck when the foreign carrier invests in a U.S. carrier. We do not have jurisdiction over the foreign carrier that has bottleneck control and that may leverage that control to gain an unfair advantage in the U.S. market. Thus, we are not confident of the effectiveness of any measures we would take to prevent anticompetitive conduct by the foreign carrier in its use of foreign bottleneck facilities.[133] Further, we do not want unnecessarily to impede the flow of U.S. telecommunications carriers' investment and entry into foreign markets. The presence of U.S. carriers not only benefits those carriers' U.S. customers, but also may foster liberalization efforts. Finally, such a restriction on U.S. investment in foreign carriers would be tantamount to an export control and would be directly contrary to long-standing U.S. policy in favor of U.S. investment abroad.

106. We reject TLD's assertion that we have not provided a reasoned rationale for applying a different regulatory approach to U.S. carrier investment in foreign carriers. TLD argues that applying the effective competitive opportunities test to foreign carriers and not to U.S. carriers is an "arbitrary or irrational" distinction because large carriers such as AT&T carry more traffic to foreign affiliates than smaller foreign carriers and thus present greater potential for competitive harm. TLD argues that such a distinction therefore violates the Equal Protection Clause.[134] The effective competitive opportunities analysis distinguishes between U.S. carriers and foreign carriers for three separate reasons. First, we do not find that the same anticompetitive concerns exist where a U.S. carrier invests in a foreign carrier as exist where a foreign carrier invests in a U.S. carrier. As discussed above, in circumstances where a U.S. carrier has a substantial investment in a dominant foreign carrier and uses its influence over the foreign carrier to obtain an anticompetitive advantage on the affiliated route, we have jurisdiction over the U.S. carrier, through its licenses and authorizations in the United States, to redress its behavior. By contrast, where a dominant foreign carrier has a substantial investment in, and influence over, a U.S. carrier, we do not have similar jurisdiction over the foreign carrier, through its foreign licenses and authorizations, to redress any anticompetitive use of its bottleneck facilities. Thus, we do not find that a large carrier, such as AT&T, creates a greater potential for anticompetitive harm

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131 *See Atlantic Tele-Network, Inc.*, 8 FCC Rcd 4776 (1993), *pet. for review denied sub nom.*, *Atlantic Tele-Network, Inc. v. FCC*, No. 93-1616 (D.C. Cir. July 25, 1995); Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25.

132 *See generally, infra* Section VII.

133 *See supra* ¶ 79.

134 TLD Comments at 60 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432).

than a smaller foreign carrier because we have confidence in our ability to guard against and redress any anticompetitive conduct in which AT&T may engage. Second, as stated above, applying the analysis to a U.S. carrier seeking to invest abroad would be contrary to U.S. policy. Third, application of the analysis to a U.S. carrier investor would not serve the market opening goals of this proceeding. TLD argues, in effect, that we should prohibit U.S. carriers from investing in foreign carriers unless the foreign markets are open to competition. Because U.S. carriers are a significant source of capital in liberalizing markets, we find that such a measure would do far more to inhibit the development of effective competition than it would to enhance it. For these reasons, we do not find that it is "arbitrary or irrational" to adopt a measure such as the effective competitive opportunities test that distinguishes between U.S. and foreign carriers. We therefore find that the effective competitive opportunities test does not violate the Equal Protection Clause.

c. Small Carrier Exemption

107. Some commenters propose that we exempt small U.S. carriers from any market entry rules adopted in this proceeding and not apply the effective competitive opportunities test to a foreign carrier investment in a U.S. carrier with gross annual revenue of less than $125 million.[135] They argue that our market entry rules would greatly restrict the flow of capital available to small carriers. AT&T argues that we should reject this proposal because it is the potential leveraging of foreign market power that creates the threat to U.S. competition and U.S consumers and businesses, regardless of the market share of the U.S. carrier.[136]

108. We do not find that a policy exempting foreign carrier investment in small carriers from our market entry rules would serve the goals of this proceeding. We reject this proposal, first, because application of the effective competitive opportunities test on a route-by route basis will not restrict the availability of capital to the extent feared by many of the commenting parties and, second, because such an exemption would allow a foreign carrier to enter the U.S. market as a small carrier and grow quickly to dominate the route to its affiliated market.

d. Applicability to Previously Authorized Affiliates of Foreign Carriers

109. We agree with TLD's argument that the test we adopt should not apply to existing Section 214 authorizations to provide international service held by foreign-affiliated

[135] CTS Comments at 5; Transworld Comments at 2.

[136] AT&T Reply at 35-36.

carriers.[137] We have imposed safeguards on existing foreign-affiliated carrier authorizations to protect against anticompetitive conduct. It also would be inequitable to subject these carriers' current authorizations to further entry review. We do not, however, agree that these foreign-affiliated carriers should be exempt from the rules adopted here for any future or pending international Section 214 applications that they are required to file with the Commission. Such an exemption would not further the goal of promoting effective competition because it would require us to ignore applications where there is a substantial risk of anticompetitive conduct. Therefore, all such carriers will have their future or pending applications subject to the standards adopted here.[138] For example, if a foreign carrier sought authority to serve an unaffiliated route, then we would not apply the effective competitive opportunities test. If applying to initiate service to an affiliated route, or to add circuits to an already-authorized affiliated route, we would apply the test as outlined in this *Report and Order*. In addition, where a previously authorized carrier has an affiliation under our modified affiliation standard, it will be required to report such relationships under the rules adopted here, and would be subject to reclassification as a dominant carrier if warranted. Finally, any applicant with a foreign carrier affiliation should amend its pending application(s) to conform to these rules within 30 days of their effective date.

3. Primary Market versus Destination Market

110. Once we determine that an applicant for international authority is affiliated with a dominant foreign carrier, we must decide which markets will be subject to the effective competitive opportunities test. In the *Notice*, we proposed to examine effective market access in the primary markets of the foreign carrier seeking entry. We defined primary markets as those key telecommunications markets where the carrier has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market share of either the international or local termination telecommunications market of the country, and the traffic flows between the United States and that country are significant.[139] We proposed that the foreign carrier would not be allowed to provide service to *any* market if *any* of its primary markets failed the effective market access test, unless other public interest factors warranted differently. In analyzing whether effective market access exists, we proposed in the *Notice* to limit our examination to the basic, international

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137 *See e.g.*, TLD Comments at 60, Reply at 48; IDB Mobile Comments at 2, 8-10; AmericaTel Comments at 5.

138 *Cf. TLD Order*, where we stated: "Given the limits imposed on our authorization to (T)LD, we will have the opportunity to attach additional conditions, where warranted, should (T)LD seek to expand its U.S. international service offerings or capabilities. We also reserve the right to impose additional conditions on (T)LD's authorized operations if, after due notice and comment, such conditions are warranted." *TLD Order*, 8 FCC Rcd 106 at 116.

139 *Notice* ¶ 43.

facilities-based telecommunications market and the local termination market of the foreign carrier.[140]

Position of the Parties

111. Our proposal to examine the primary markets of the foreign carrier seeking entry elicited numerous responses from the commenters. Their main concern with the primary market approach is that it is either too vague or overly broad.[141] Cable & Wireless claims that a broad primary market inquiry might lead to protracted and contentious proceedings. It argues that a home market approach provides the most effective method of opening foreign markets as it would motivate the home government to liberalize because its own nationals would benefit.[142] In contrast, it notes that, where the foreign carrier has interests in many countries outside its home market, the governments in these primary, but non-home, markets lack sufficient motivation to encourage competition because doing so would not directly benefit their nationals.

112. TLD argues that any entry standard should only apply to applications that propose to serve a country where the applicant is affiliated with the terminating carrier.[143] TLD argues that there are no anticompetitive or discrimination concerns raised when a carrier serves a route where it has no affiliation with a terminating carrier.

113. Domtel urges the Commission to change its definition of a "primary market" to the key markets where a carrier has a significant ownership interest in a facilities-based telecommunications entity that has a dominant (45 percent or more) combined market share of the local exchange and domestic and international basic services of the foreign market, and traffic flows between the United States and that country are significant.[144]

114. France Telecom recommends that the Commission consider the openness of the entire telecommunications market and not only the basic, international facilities-based services segment.[145] France Telecom urges the Commission to be flexible and recognize the progress

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[140] *Notice* ¶¶ 43, 44.

[141] British Government Comments at 6 (too vague), DOJ Reply at 25 (overly broad), TLD Comments at 65, Cable & Wireless Comments at 5.

[142] Cable & Wireless Comments at 3, 6. *See also* TLD Comments at 65.

[143] TLD Comments at 63.

[144] Domtel Reply at 10.

[145] France Telecom Comments at 15-17; *See infra* at ¶ 122.

some countries are making toward liberalization of their overall communications market.[146] Similarly, Teleglobe urges the Commission to adopt a standard based on the existence of "mutually advantageous market opportunities" for U.S. companies in the applicant's primary market.[147]

115. Justice urges the Commission to examine the overall competitiveness of the foreign market, including the extent to which competition from non-U.S. facilities-based carriers in that market reduces the market power of the dominant telecommunications carrier.[148] Justice also encourages us to consider in our market access analysis whether or not there is a general prohibition on competitive entry in any area of services and facilities in the country that could affect international telecommunications.[149]

Discussion

116. We conclude we should apply an effective competitive opportunities test to all applications by foreign-affiliated carriers to operate as U.S. international carriers to foreign points where the affiliated foreign carrier has market power. This may include the home market of the foreign carrier, but it also includes all other destination markets where it has the ability to leverage market power. We define market power as the ability of the carrier to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the foreign end.[150] "Bottleneck services or facilities" are those that are necessary for the provision of international services, including inter-city or local access facilities on the foreign end. We believe that there is no need for us to apply an effective competitive opportunities analysis when a foreign carrier seeks to serve countries where it does not own or control bottleneck facilities that give it a dominant market position. We believe this approach balances the commenters' concerns, without limiting our ability to encourage closed markets to open.

117. The approach we adopt differs from the *Notice*'s primary market proposal in that it would not apply an effective competitive opportunities analysis to applications from foreign carriers to serve countries where they have no affiliates and are unable to exploit market power as they could if they served a destination market where they maintained a dominant market position. Under our original proposal, we could deny a foreign-affiliated

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146 *See also* GTE Comments at 2-3. GTE supports a flexible determination of effective market access.

147 Teleglobe Comments at 11, Reply at 17. This approach would hinge on overall market conditions and would allow entry into the U.S. market so long as the foreign telecom market as a whole is considered sufficiently open to create a climate of mutually advantageous market opportunities for U.S. carriers.

148 DOJ Reply at 26.

149 *Id.*

150 *Cf. International Services*, 7 FCC Rcd 7331 at 7334.

carrier *any* international facilities-based Section 214 authority if only one of the primary markets in which it has an affiliation is not open to effective competitive opportunities. That approach would put the Commission in the position of potentially denying a foreign carrier U.S. international facilities on routes where there was little threat to competition. It would unnecessarily deprive the U.S. market of additional competition, and it would place unwarranted burdens on the Commission's resources.[151] It would also have required us to determine which markets were "primary" and which were not, an analysis that would have been imprecise and controversial.

118. We believe our new approach's focus on market power in destination markets will better enable us to achieve our goals in this proceeding. Under this approach, we could grant a foreign carrier seeking to enter the U.S. market for the first time Section 214 authority to serve all U.S. international routes on a facilities (or resale) basis, with the exception of a route where the foreign carrier has market power on the foreign end and is unable to demonstrate that effective competitive opportunities are available in the foreign country. Where the foreign carrier seeks to invest in or acquire an existing U.S. carrier, we could condition approval of the investment or acquisition on the U.S. carrier divesting its operating interests, including direct circuits to the foreign country.

119. We also do not agree with Cable & Wireless' suggestion that we should adopt a "home market" approach. Contrary to Cable & Wireless' arguments, a pure home market approach is too narrow. Some foreign carriers operate as the dominant carrier in numerous markets around the world. If we only examined their home market, we would be ignoring significant competitive issues in other affiliated markets.[152]

120. Under our route-by-route approach, we will prohibit a U.S. carrier with a foreign carrier affiliation from using its authorized U.S. international facilities or services on unaffiliated routes to provide direct or indirect service to any country where it is affiliated with a foreign carrier, unless and until it secures additional specific authority for such service from the Commission. A carrier may not, for instance, provide service on a facilities-basis, over resold private lines, or via switched resale to a third country and then route such traffic back to an affiliated country where it possesses market power. Allowing foreign carriers to indirectly serve markets which they are barred from serving directly would defeat the purposes behind the effective competitive opportunities analysis and not contribute to the goals of this proceeding.

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151 *See* Teleglobe Comments at 4. It notes that, as proposed, the standard would be unlikely to yield administrative efficiencies or reduce burdens on the Commission's resources.

152 *See supra* Section III.D.2.a (concluding that we will apply the effective competitive opportunities test only to foreign carriers that are dominant or affiliated with a dominant carrier in the destination market they seek to serve).

121. Our focus in applying the effective competitive opportunities analysis to applications for facilities-based entry is on the ability of a U.S. carrier to enter a foreign country and provide facilities-based IMTS. We recognize the concerns of those commenters that support a flexible market segment-by-segment approach to acknowledge the progress some countries are making in liberalizing their markets, and we welcome liberalization in all market segments. But the reality remains that IMTS accounts for the vast majority of the revenues in facilities-based international services and is a service of paramount importance to U.S. consumers. In addition, a broad inquiry into market segments of a country's telecommunications market would be time-consuming and burdensome on Commission resources, and bear little relation to our objective to prevent anticompetitive conduct in the provision of U.S. international services. We accordingly conclude that the legal ability to provide IMTS in a foreign market must remain the focus of our effective competitive opportunities analysis for facilities-based applications from foreign carriers. Therefore, we decline to adopt France Telecom's and Teleglobe's suggestion that we analyze every market segment before determining whether or not effective competitive opportunities exist for U.S. carriers in that market.

122. We also reject France Telecom's request that we not accord primacy to the basic, international facilities-based segment of the foreign carrier's home market but rather that we consider a foreign market as a whole.[153] This is the segment that poses the greatest competitive concerns for the provision of facilities-based service. The goals of this proceeding would not be served, absent other public interest considerations, by allowing a foreign carrier with control over bottleneck services or facilities to provide international facilities-based service from the United States to those markets that are open only for other types of service, such as cellular or paging services.[154] Such an approach would not sufficiently address the potential for a foreign carrier to use its control over bottleneck services and facilities to discriminate against unaffiliated U.S. facilities-based carriers, or to compete in the United States not on its merits, but rather on the basis of its protected position in a foreign market.[155]

123. As stated *supra* at ¶ 45, we will, as Justice suggests, consider as relevant to our effective competitive opportunities test evidence of any competition in the international facilities-based services market of the destination country, including competition from non-U.S. facilities-based carriers. We would view a general prohibition on competitive entry by

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153 France Telecom Comments at 15.

154 We reiterate, however, that the state of liberalization for local access and intercity services is relevant to the interconnection factor of the effective competitive opportunities test. *See supra* ¶ 61.

155 We also decline to make specific findings under our effective competitive opportunities analysis for particular countries in this proceeding as fONOROLA requests with respect to Canada. We also consider as beyond the scope of this proceeding MFSI's request that we limit Canadian ownership of wireline facilities in the United States to the same minority interest level permitted U.S.-owned firms in Canada. *See* fONOROLA Comments at 19, MFSI Comments at 13-14.

U.S. carriers, however, as unacceptable under the Section 214 analysis that we adopt here. Absent the legal ability to obtain a controlling interest in a facilities-based carrier in a foreign market, U.S. carriers cannot obtain a degree of bargaining power sufficient to constrain anticompetitive behavior by the incumbent carrier in that market, or respond effectively to competitive inroads made by the incumbent as a result of its unique ability to operate on an end-to-end basis.

IV. OTHER MARKET ENTRY ISSUES

A. Definition of a Facilities-Based Carrier

124. Our regulation of U.S. international services traditionally distinguishes between facilities-based service and resale for two reasons. First, facilities-based carriers have greater freedom than resellers to set prices because the authority they exercise over provisioning and configuration of facilities provides a high degree of control over costs not available to resellers. Second, facilities-based carriers' ability to configure facilities and route traffic according to their specific needs provides them with significantly greater ability than resellers to engage in anticompetitive conduct, especially where they control bottleneck facilities.[156] As a result, we have historically scrutinized facilities-based carriers more closely than resellers in both the entry and post-entry contexts. The distinction is also relevant in the context of our private line resale policy, where we have required resellers of private lines for the provision of switched services to demonstrate that equivalent resale opportunities exist in the destination country before offering this service.[157]

125. In its petition for rulemaking, IDB asked that we adopt a new definition of a facilities-based carrier because it found that recent Commission actions had created confusion regarding this definition.[158] IDB urged that we consider as facilities-based a carrier that obtains the maximum interest permitted by law in a cable or satellite circuit. A carrier thus would be considered facilities-based in the United States if it purchases an ownership or indefeasible right of user (IRU)[159] interest in a U.S. half-circuit in an international cable or satellite (whether common carrier or non-common carrier) or if it leases satellite capacity

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156 *See supra* ¶ 116.

157 *See Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1992) *(International Resale Order)*; *Order on Reconsideration*, 7 FCC Rcd 7927 (1992), *petition for reconsideration/clarification pending*. *See also infra*, ¶ 133.

158 *See Notice* ¶ 68.

159 An IRU interest is one in which the holder acquires the exclusive and irrevocable right to use the facility, but not the right to control the facility. *See, e.g., Reevaluation of the Depreciated-Original-Cost Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between or Among U.S. Carriers*, 2 FCC Rcd 1465 (1987).

directly from Comsat.[160] IDB argued that, to the extent the Commission seeks to exercise jurisdiction over carriers providing the foreign half-circuit, the Commission should treat as facilities-based a U.S. carrier that directly leases a foreign half-circuit if that is the maximum interest allowed by foreign law.[161]

126. Our *Notice* tentatively concluded that we should not consider the nature of a carrier's interest in a foreign half-circuit. We proposed to codify our current definition of a U.S. facilities-based carrier as one that purchases an ownership or IRU interest in a U.S. half-circuit in an international satellite or submarine cable (whether common carrier or non-common carrier) or if it leases a U.S. half-circuit from Comsat or from a non-common carrier international satellite or submarine cable provider. We tentatively found that IDB's proposed maximum interest test could undermine the purpose of our *International Resale Order*[162] and also could encourage foreign countries to stop short of creating full facilities-based competition.[163]

Positions of the Parties

127. Several parties commented on this issue. Some U.S. carriers agree that we should codify our current definition and reject the maximum interest test for the reasons set forth in the *Notice*.[164] Teleglobe opposes our proposed codification because it would treat some leases as facilities-based in the U.S. market, but would not treat equivalent leases as valid evidence of facilities-based competition in foreign markets.[165] CTS and Transworld warn that small carriers often are unable to conclude operating agreements with foreign administrations when they are classified as resellers. Thus, classifying all circuits leased from a common carrier as "resold" could hinder their efforts to enter foreign markets.[166]

128. IDB similarly maintains that it is arbitrary to classify a carrier as facilities-based when it leases capacity from COMSAT or from a non-common carrier submarine cable or satellite provider, while classifying a carrier as a reseller when it leases capacity from a

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160 IDB's proposed definition would not consider a carrier that leased circuits in a cable or satellite circuit to be facilities-based where ownership or IRU interests are available.

161 *Notice* ¶¶ 67-71.

162 7 FCC Rcd 559.

163 *See Notice* at ¶ 71.

164 AT&T Comments at 51; MCI Comments at 18; MCI Reply at 17-18; AmericaTel Reply at 13.

165 Teleglobe Comments at 31.

166 CTS Comments at 6; Transworld Comments at 6-7.

common carrier submarine cable or satellite provider.[167] IDB reiterates its proposal to adopt a definition of a facilities-based carrier as one that acquires the maximum interest allowed by law. IDB also argues that the lease of foreign circuits should be considered facilities-based. IDB contends that our proposed definition will preclude U.S. carriers from offering foreign customers private line services that are interconnected at a U.S. carrier's central office. It also observes that exacerbation of the settlements imbalance is not as great a cause for concern as it once was. IDB also concludes that its maximum interest test does not send the wrong message to foreign countries regarding liberalization of facilities-based services because our proposed standard itself should make clear the Commission's intent. In any case, argues IDB, terminology should not dictate a regulatory framework.

Discussion

129. We find our proposed definition of a facilities-based carrier as modified below, to be more workable than IDB's maximum interest test. Our definition can be applied in a uniform manner, whereas a maximum interest test would treat the same configurations differently based on differing regulatory structures. IDB's proposed definition also could have the undesirable effect of treating as resellers certain carriers that are currently considered facilities-based. Specifically, carriers that lease capacity in U.S. non-common carrier submarine cables or in separate satellite systems are considered facilities-based despite the fact that they do not obtain the "maximum interest" allowed by law. Further, IDB's definition could appear to legitimize limiting competition in foreign markets to resellers of foreign half-circuits provided by a monopoly carrier. Finally, IDB is concerned that our proposed definition may cause a U.S. facilities-based carrier to lose its facilities-based characterization because it interconnects its U.S. half-circuit with a leased foreign half-circuit.[168] We clarify here that our definition of a facilities-based carrier focuses solely on the U.S. half-circuit. Our definition does not consider the nature of a U.S. carrier's interest, if any, in the corresponding foreign half-circuit.

130. We recognize, however, as pointed out by IDB, CTS, and Transworld, that our past distinctions between facilities-based definitions applicable in private and common carrier systems may have outlived their usefulness. CTS and Transworld urge us to strive, wherever possible, to ensure that our rules do not inadvertently impede new carriers from providing service between U.S. and foreign markets. We therefore adopt the proposal to treat as facilities-based a carrier that leases a half-circuit on a common carrier cable. We see no reason to classify carriers differently based on the regulatory classification of the underlying facility that they use to carry their traffic. We emphasize, however, that the leases we refer to here are of bare capacity only and do not refer to the lease of a private line. A

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167 IDB Comments at 20.

168 Some commenters read the *Notice* to propose classifying as a reseller a U.S. carrier that owns the U.S. half of an international circuit and leases the matching foreign half-circuit. *See* IDB Comments at 23. We do not regulate carriers in such a manner, and we did not intend this by our *Notice*.